

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DARREN T. VOILES**  
Claimant

VS.

**KEYSTONE AUTOMOTIVE OPERATIONS**  
Respondent

AND

**HARTFORD INS. CO. OF THE MIDWEST**  
Insurance Carrier

Docket No. **1,049,266**

**ORDER**

Claimant requests review of the July 15, 2010 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

**ISSUES**

The claimant was receiving treatment for his left shoulder due to a non-occupational injury. Initially, respondent accommodated claimant's work restrictions but later claimant was transferred to a job that required lifting weights in excess of his restrictions. Claimant's left shoulder condition worsened and finally his physician recommended another shoulder surgery. Respondent sought a second opinion and denied the request for surgery.

The Administrative Law Judge (ALJ) described the issue at the preliminary hearing as whether additional medical treatment and the shoulder surgery was related and necessary for the work-related injury. After hearing the evidence and considering the record which included physician testimony both for and against surgery, the ALJ denied claimant's request for additional medical treatment. The ALJ concluded claimant had failed to meet his burden of proof that the additional medical treatment was reasonable or necessary to cure and relieve whatever injury or exacerbation of symptoms that may have occurred on or about September 28, 2009.

Claimant requested review of whether he was entitled to additional medical treatment, specifically the surgery recommended by his personal physician.

Respondent argued the ALJ's Order should be affirmed.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant had suffered injuries to his left shoulder while playing soccer that required surgery in 2006 and 2007. In June 2009, claimant was helping some friends move a refrigerator and he again hurt his left shoulder. Claimant's personal physician, Dr. Andrew Scott provided treatment including physical therapy. During this treatment and physical therapy the claimant continued working for respondent and was provided light-duty work called will-call.

Later, claimant's supervisor recommended that he move to the FedEx department which claimant agreed to as long as he didn't have to do any heavy lifting. Then two to three weeks later, claimant was informed by his boss that he had to do the heavy lifting. Claimant was afraid of being fired for insubordination so he did the lifting. He testified that the boxes weighed at least 40 pounds. The first day claimant had help with lifting the heavy boxes. The next day his shoulder began to hurt and he notified his supervisor but was still required to work. On the third day, claimant was finally sent home.

Claimant sought additional medical treatment on his own with Dr. Scott. Claimant was taken off work by Dr. Scott for two weeks for which he received temporary total disability benefits from respondent. The doctor then ordered additional physical therapy and prescribed some pain medication. After no success with physical therapy the doctor reluctantly recommended surgery. Respondent sought a second opinion and Dr. Erich Lingenfelter examined claimant, reviewed an MRI which did not reveal a labral tear and recommended against surgery concluding such treatment might worsen claimant's condition.

At the preliminary hearing, the ALJ noted the issue was whether claimant needed additional treatment for his left shoulder for the work injury. As claimant pointed out in its brief to the Board, the initial issue is whether the Board has jurisdiction to address the issue raised on appeal from a preliminary order.

The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?

3. Did the worker provide both timely notice and timely written claim of accidental injury?
4. Is there any defense that goes to the compensability of the claim?<sup>1</sup>

Additionally, the Board may review those preliminary hearing orders where it is alleged a judge has exceeded his or her jurisdiction or authority in granting or denying the benefits requested.<sup>2</sup>

Claimant's entitlement to medical treatment is not one of the jurisdictional issues listed above over which the Board would take jurisdiction on an appeal from a preliminary hearing order. The fact that claimant suffered an accidental injury on or about September 28, 2009, is not in dispute.<sup>3</sup> It is the nature and extent of that injury which remains in dispute. Although articulated somewhat differently, distilled to its essence claimant alleges an entitlement to ongoing medical care. The Board does not have jurisdiction to consider appeals from preliminary hearing orders pertaining to ongoing medical care.

The ALJ determined that claimant was not entitled to additional medical treatment. Whether claimant's left shoulder injury or exacerbation of symptoms resulted in the need for additional medical treatment is not an issue over which the Board would take jurisdiction.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>4</sup>

In this instance, the ALJ determined that claimant had not met his burden of proof that he needed additional medical care for his left shoulder. This Board Member determines the Board does not have jurisdiction to consider claimant's entitlement to medical treatment and, therefore, the appeal of claimant in this matter should be dismissed.

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<sup>1</sup> K.S.A. 44-534a.

<sup>2</sup> K.S.A. 2009 Supp. 44-551.

<sup>3</sup> It should be noted that on the second page of the ALJ's Order the accident date is erroneously listed as September 28, 2008 instead of 2009 as indicated on the first page of the Order.

<sup>4</sup> *Provance v. Shawnee Mission U.S.D.* No. 512, 235 Kan. 927, 683 P.2d 902 (1984); *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>5</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.<sup>6</sup>

**WHEREFORE**, it is the finding of this Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated July 15, 2010, remains in full force and effect and the appeal of claimant from that Order should be, and is hereby, dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of September 2010.

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HONORABLE DAVID A. SHUFELT  
BOARD MEMBER

c: Steven J. Borel, Attorney for Claimant  
Anemarie Mura, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge

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<sup>5</sup> K.S.A. 44-534a.

<sup>6</sup> K.S.A. 2009 Supp. 44-555c(k).